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Legal Sidebar

Litigating the January 6 Committee's Subpoena to Former President Trump

November 17, 2022

On October 21, 2022, the Select Committee to Investigate the January 6th Attack on the United States Capitol (Select Committee) issued a subpoena to former President Donald J. Trump as part of its continuing investigation into the events of January 6, 2020. The subpoena demanded that the former President provide the Select Committee with 19 categories of documents and sworn testimony through a deposition or series of depositions. On November 4, 2022, in an apparent effort at accommodation, the Select Committee requested that the President turn over a subset of the demanded records—including records of calls and text messages made by or on behalf of the President on January 6 through nongovernmental devices—by November 9. As that deadline approached, the former President's legal counsel informed the Select Committee that, though preserving Mr. Trump's legal objections, a voluntary search "found no documents responsive to the request." Then, on November 11, the former President filed suit against the Select Committee and its Members in federal district court to block the October 21 subpoena.

This Sidebar will briefly address whether the federal judiciary is likely to rule on the substance of the former President's lawsuit. As explained below, both the Supreme Court's existing jurisprudence and recent lower court decisions make clear that the U.S. Constitution's Speech or Debate Clause prohibits courts from entertaining direct challenges to congressional subpoenas filed against Members or committees. Mr. Trump's claim is, therefore, likely barred by the Clause. Ultimately then, this subpoena disagreement may be resolved, if at all, through continued negotiations. Those negotiations need not cease as a result of the former President's lawsuit. Nor does the suit prevent the Committee from attempting to compel Mr. Trump's compliance, including through civil proceedings or a criminal contempt of Congress referral. That said, given both the uncertainty of the Select Committee's future and other factors, these options may have limited value in forcing disclosure in this instance.

The Speech or Debate Clause and Lawsuits Seeking to Block a Congressional Subpoena

The U.S. Constitution's Speech or Debate Clause (Clause) provides that, for any "Speech or Debate in either House," Members of Congress "shall not be questioned in any other Place." The purpose of the Clause is to "protect the integrity of the legislative process" by ensuring that Congress and its Members

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LSB10864

are free to perform their legislative tasks "independently" and free from intimidation or harassment from either the executive or judicial branches. As such, the Clause serves to "reinforce the separation of powers." To achieve these ends, the Supreme Court has interpreted the Clause as (among other protections) shielding Members of Congress and congressional committees from civil suits predicated on their "legislative" activities.

The Supreme Court has also established that because the Clause must be read "broadly to effectuate its purposes," the types of "legislative acts" receiving protection go well beyond formal speech or debate in the halls of Congress and include, among other activities, investigative actions sanctioned by either the House, Senate, or a congressional committee. The Supreme Court, on several occasions, has held that Congress's investigative and subpoena powers "plainly fall" within the definition of "legislative" for purposes of the Clause. This determination is significant because, when the Clause applies, its protections are "absolute" and a "jurisdictional bar" to judicial consideration of a claim. As a result, courts have generally dismissed civil lawsuits filed against Members of Congress or congressional committees seeking to quash or block congressional subpoenas.

This principle is reflected in the 1975 Supreme Court decision in *Eastland v. United States Serviceman's Fund*. In that case, a private nonprofit organization filed suit against the chair of a Senate subcommittee asking the Court to enjoin the subcommittee's subpoena. The Court held that, because the "power to investigate and to do so through compulsory process plainly" qualified as "integral" to the legislative function, the issuance of the subpoena was a protected legislative act so long as it was issued "pursuant to an authorized investigation." Concluding on the question of authorization that the Senate subcommittee was acting under an "unambiguous resolution from the Senate" and that the investigation was "within [the committee's] province," the Court held that the Speech or Debate Clause provided "complete immunity for the Members" and that the subpoena was "immune from judicial interference."

Eastland is generally relied upon for the proposition that the Clause prohibits courts from entertaining direct challenges to congressional subpoenas filed against Members or committees. Just this year, for example, the courts turned away a number of subpoena challenges lodged against Members or committees.

Still, the Clause immunizes Members, not subpoenas. The concurrence in *Eastland* and subsequent judicial decisions make clear that there are scenarios in which courts *can* entertain challenges to the validity of a congressional subpoena without running afoul of the Clause.

First, a court may assess the validity of a subpoena in a civil enforcement lawsuit *initiated by Congress*. Both the House and Senate have sought to utilize the courts to help enforce their committee subpoenas. Because the committee involved takes the position of voluntary plaintiff, and is not compelled into court, there is "no 'question(ing) in any other Place' of the Speech or Debate of the Congress."

Second, the Clause does not bar a court from assessing the validity of a subpoena when raised as a defense in a criminal contempt of Congress prosecution. For example, Steve Bannon, a former advisor to former President Trump, was able to challenge (albeit unsuccessfully) the underlying Select Committee subpoena that gave rise to his recent prosecution for contempt of Congress.

Third, a court may assess the validity of a subpoena for documents when the subpoena is issued to a third-party custodian and the true target of the subpoena sues that third party—rather than suing a Member or the committee—to block compliance. The U.S. Court of Appeals for the District of Columbia Circuit has explained that, if a party is "not in a position to assert its claim of constitutional right by refusing to comply with a subpoena" because the subpoena was issued to a neutral third party, then the Clause "does not bar the challenge so long as Members … are not, themselves, made defendants in a suit to enjoin implementation of the subpoena." The Supreme Court's most recent pronouncement on Congress's subpoena power, *Trump v. Mazars*, falls into this category. In that case, the court reached the merits of a

suit brought by then-President Trump against his bank and accounting firm to block those entities from complying with committee subpoenas for his financial records.

Application to the Former President's Recent Lawsuit

In light of these established principles, it would appear that the former President's lawsuit is likely barred by the Clause. The suit is a direct challenge to the validity of a congressional subpoena filed against the Select Committee and its Members. Under *Eastland* and other cases, that appears to be precisely the type of claim that the Clause protects against. As the Court stated in *Eastland*, "judicial interference" in congressional investigations can "frustrate[] a valid congressional inquiry." "The Clause was written," the Court warned, "to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority."

Nor does the former President's suit fall into any of the three noted exceptions to the general immunity rule. This suit was not initiated by the House, the claims have not been raised in defense to a criminal contempt prosecution, and the subpoena was issued not to a third party but directly to Mr. Trump.

Nevertheless, before potentially dismissing Mr. Trump's suit under the Clause, some courts have read *Eastland* as suggesting that a reviewing court should first consider whether the Select Committee's subpoena was issued "pursuant to an authorized investigation," and was "related to and in furtherance of a legitimate task of Congress." The Supreme Court, however, made clear in *Eastland* that this "is a subject on which the scope of []inquiry is narrow" and much more limited than the traditional "legislative purpose" test that courts engage in when reviewing the merits of a subpoena. Other cases have similarly emphasized the "narrow confines" of the court's task in this type of context, noting that to go beyond a "cursory" assessment of the subpoena would undermine the protections of the Clause. In light of these statements, and because the D.C. Circuit has held in a related context that the general scope of the Select Committee's investigation was authorized and—at least with respect to the Select Committee's requests for the President's official documents from the National Archives and Records Administration—"plainly" had a valid legislative purpose, it seems unlikely that a court would find that the Select Committee could not satisfy *Eastland's* relatively generous threshold inquiry.

Mr. Trump may also assert that traditional Speech or Debate principles do not apply to a suit like his: one that may implicate the separation of powers by directly placing a former President against a committee of Congress. In a case involving a subpoena issued to Mr. Trump's former Chief of Staff, Mark Meadows, the U.S. District Court for the District of Columbia recently rejected a similar argument—that the Clause is not an absolute bar to judicial review of congressional subpoenas when a subpoena implicates asserted executive prerogatives like testimonial immunity and executive privilege. In that case, Mr. Meadows relied on a passage from *United States v. AT&T*, a 1976 decision of the D.C. Circuit, that suggested "[i]t may be . . . that the *Eastland* immunity is not absolute in the context of a conflicting constitutional interest asserted by a coordinate branch of the government." The district court rejected Mr. Meadows's reading of *AT&T* as appropriate only when "Speech or Debate Clause immunity is inapplicable." When the Clause applies, however, its immunity does not "weaken[] when a suit against congressional defendants implicates conflicting interests of coordinate branches." Still, no appellate court has ruled on this argument, and separation of powers considerations could be different in a case involving a subpoena to a former President.

The notion that possible separation of powers concerns implicated by Mr. Trump's lawsuit could permit a court to hear a subpoena dispute that it might otherwise dismiss could be viewed as inconsistent with prior executive branch statements. As asserted in various cases, the executive has previously argued that, at least when it comes to standing in inter-branch subpoena disputes, "the political branches must do battle in the political arena, not appeal to the Judiciary as a superior branch of government for a definitive resolution." How courts should deal with separation of powers questions when the views and interests of

a former President do not align with the views and interests of the current executive branch has been the subject of much recent litigation.

The Impact of the Case

Irrespective of Mr. Trump's pending suit, if his position is that the subpoena is invalid and that he will not comply, the burden would fall to the Select Committee to compel his compliance. A possible judicial dismissal of the suit would not advance that goal.

Without cooperation from the former President, the Select Committee would likely need to wield its own tools of leverage in order to obtain the information it seeks. Traditional tools of leverage vary but include the use of legislative powers to encourage compliance; criminal contempt of Congress to deter noncompliance; or civil enforcement of the subpoena to obtain a court order mandating compliance. The timing and context of this dispute, however, would appear to diminish the persuasive value of these tools.

With respect to legislative powers, when Congress is seeking information from an uncooperative executive branch official, it can leverage funding, alterations to legislative authority, the confirmation of nominees, and other legislative tools to encourage compliance. As a private citizen, those traditional tools would appear to exert little influence over Mr. Trump.

The deterrence value of criminal contempt of Congress would similarly appear to be decreased here. Although the House has complete control over whether to approve a criminal contempt citation against a noncompliant witness, history suggests that whether that citation is enforced is a decision that rests with the Department of Justice (DOJ). That prosecutorial decision is one that is usually made based on executive branch policy and precedent. Given that (1) DOJ has generally viewed the separation of powers as providing former Presidents with absolute immunity from congressional testimony on actions they took while President, and (2) the Department declined, reportedly on similar separation of powers grounds, to prosecute former Chief of Staff Mark Meadows for his refusal to comply with a subpoena from the Select Committee, it is far from certain whether DOJ would pursue a prosecution against a former President in this context. However, DOJ has not been entirely consistent in its application of its testimonial immunity doctrine. While declining to prosecute Mr. Meadows, it did indict another presidential adviser, Peter Navarro, for contempt of Congress arising from his failure to comply with a Select Committee subpoena. Also, DOJ's position on congressional subpoenas for documents differs from its position on subpoenas for testimony, as does its position on disclosing information relating to private conduct rather than official duties.

Civil enforcement of the Select Committee's subpoena in the courts also seems to have limited utility. While it is true that such a suit or counterclaim would not be barred by the Clause—since it would be initiated by the Committee itself—it is doubtful that any such case could reach a final resolution before the Select Committee's authorization expires at the end of the 117th Congress. At that point any civil enforcement lawsuit would likely become moot, unless the House majority in the next Congress renews the Select Committee's charter. In short, a civil suit would likely take time that the Select Committee may not have.

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